BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHELLE REVES Claimant	)	
VS.	)	
MIDWEST APPLIANCE CENTER, INC. Respondent	)	Docket No. 1,039,265
AND	)	
CINCINNATI INSURANCE COMPANIES Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 10, 2009, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on August 11, 2009. Richard H. Seaton, of Manhattan, Kansas, appeared for claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant has a 10 percent permanent partial impairment to the whole body. The ALJ further found that claimant voluntarily abandoned her job with respondent to take a lower paying part-time job and, accordingly, is not entitled to work disability.

The Board has considered the record and adopted the stipulations listed in the Award. However, with regard to Stipulation No. 7, the parties agree that claimant was paid a total of $12,645.28 in temporary total and temporary partial disability compensation, but with a compensation rate of $318.26 as determined by the ALJ, this is the equivalent of 39.73 weeks of temporary total disability. During oral argument before the Board, the parties further agreed that claimant's percentage of functional impairment is 10 percent.

ISSUES

Claimant appeals the decision of the ALJ denying an award of work disability. Claimant contends she demonstrated good faith in continuously working since her release from medical treatment. However, she asserts that because of her pain and the side effects of her medication, she is unable to work more than half time, and she eventually sought half-time employment elsewhere to avoid working a split shift at respondent. Further, claimant argues that she has not earned more than 90 percent of her pre-injury average weekly wage since returning to work after her injury, thus qualifying her for a work disability.

Respondent argues that claimant is not entitled to an award based on work disability because she refused to work a full shift or split shift despite the lack of any restrictions that would have prohibited her from so doing. Further, respondent argues that claimant voluntarily terminated her position at respondent, even though respondent was accommodating her restrictions, to take a part-time job at a lower wage. Respondent also contends that claimant is not entitled to reimbursement for outstanding medical expenses from St. Francis Health Care and Dr. Guy Giroux, which were ordered paid by the ALJ. Respondent asserts that because claimant did not obtain a referral for those services from her authorized treating physician, those expenses are unauthorized and respondent's obligation for reimbursement is limited to $500.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability? Specifically, is claimant entitled to an award for work disability?

(2) Should respondent pay claimant's medical treatment expenses with St. Francis Health Care and Dr. Guy Giroux as authorized or unauthorized medical?

FINDINGS OF FACT

Claimant worked for respondent as the appliance manager earning $12.10 per hour plus overtime, sales commissions and a 25¢ per hour bonus for coming to work when scheduled. She was also paid $175 per month above her salary, which was the amount of money respondent would have paid if claimant had opted in to its group health and dental insurance. This benefit was available only to full-time employees who worked at least 38 hours per week.

On June 14, 2007, claimant was attempting to move a washing machine using a dolly when the dolly and washing machine tipped back towards her. She fell backwards toward the floor but caught herself with her hands and did not hit the floor hard. A customer caught the dolly and washing machine before they landed on her. She did not realize she had been hurt until later.

About a week after the accident, claimant sought treatment from her personal physician, Dr. Douglas Hinkin. An MRI done on July 6, 2007, showed she had a herniated disc at L5-S1. At that point, claimant stopped working. Dr. Hinkin sent her to physical therapy, and claimant had three epidural steroid injections with little relief. In August 2007, Dr. Hinkin suggested she have a second opinion by an orthopedic surgeon or neurosurgeon.

Respondent referred claimant to Dr. Michael Smith. She first saw him on August 28, 2007. Dr. Smith performed a laminectomy and discectomy on October 4, 2007. On follow-up, claimant continued to complain of pain numbness in her right leg. Dr. Smith sent her to work conditioning therapy and she eventually returned to work half days. Dr. Smith also ordered a functional capacity evaluation (FCE), which was done on December 22, 2007. A repeat MRI of her lumbar spine was done on December 28, 2007, which did not show any recurrent herniation but did show some scarring.

When claimant saw Dr. Smith on January 4, 2008, she was still in pain, and Dr. Smith referred her to Dr. Guy Giroux for a series of epidural steroid injections, but the injections gave her no relief. On February 22, 2008, Dr. Smith prescribed Lyrica. He released her from treatment on March 7, 2008.

Claimant testified that she got dramatic relief from Lyrica, but one of the side effects is drowsiness. She also believes the Lyrica distorts her ability to comprehend that she is making mistakes. She testified that on one occasion, she mistakenly ordered 31 blenders for respondent's store, rather than 1. Another time, she mistakenly ordered a refrigerator in white instead of stainless steel. Karalee Ridder, respondent's store manager, however, testified that keying in the wrong number on orders is common and that claimant had made mistakes even before her injury. Ms. Ridder said she has made the same type of mistake herself. In regard to the refrigerator, Ms. Ridder remembered an incident where a customer gave claimant the model number for a white refrigerator, and claimant ordered that model. However, the customer wanted a stainless steel model. Ms. Ridder said the white refrigerator was put out on the floor and was sold. Ms. Ridder said that type of mistake was also common at respondent.

After claimant was released to full time work by Dr. Smith in March 2008, she and Ms. Ridder had a discussion concerning her return to full time work. Ms. Ridder said that she made up a schedule where claimant would return to work at 38 to 40 hours a week. Claimant told Ms. Ridder, however, that she was in pain and would not be able to work more than four hours a day. Claimant had no work restriction limiting her number of hours to work, and Ms. Ridder continued to schedule her for full-time work. Ms. Ridder said that she did not take any disciplinary action against claimant for not working her full shift. However, because claimant was not working at least 38 hours per week, respondent stopped paying her the $175 per month previously paid as part of her health and dental insurance benefit as of April 1, 2008.

Ms. Ridder testified that in mid-May, one of respondent's managers left, which meant that more nights would need to be covered and all the managers would need to close two nights a week. She offered claimant first choice of which days she would close, and claimant chose Sunday and Tuesday. On Sundays, the store closed at 6 p.m. On Tuesdays, claimant would work a split shift in which she would work from 8 a.m. to either noon or 1 p.m., then would go home, take a Lyrica pill and rest, and then return to work for three or four hours. Claimant testified that when she would work a split shift on Tuesday, she would not be able to work the next day because of her pain, but Ms. Ridder said that Wednesday was the day claimant was scheduled to be off. Ms. Ridder testified that during this period of time, claimant was probably working from 26 to 31 hours per week. Claimant testified that she worked about 30 hours per week.[1]

In June 2008, claimant presented Ms. Ridder with a letter from Dr. Hinkin in which he restricted claimant to working only five hours per day. After receipt of this restriction, Ms. Ridder revised claimant's schedule again. Claimant still had to close the store two days a week, but she was only scheduled to work four or five hours a day.

In August 2008, claimant attended a trade show on respondent's behalf in Las Vegas. While there, she was required to do a lot of walking, which caused her a lot of pain. Claimant testified that she told Ms. Ridder about the pain when she returned and that Ms. Ridder told her to do what she wanted. Claimant then called Dr. Giroux, who performed two epidural injections on claimant on August 27, 2008. Claimant admits she did not get a referral from her authorized treating physician, Dr. Smith, before seeing Dr. Giroux because Dr. Smith had already released her.

In mid-September 2008, claimant turned in her resignation to respondent, saying she had been offered a job at Kansas State University. Before claimant turned in her resignation, she and Ms. Ridder had been talking about rearranging the store and moving claimant's office and computer downstairs so she would not have to go up and down the stairs. Ms. Ridder stated that although claimant did not have a restriction against climbing stairs, she was trying to accommodate her and make it easier for her at work.

Claimant was examined by Dr. John Gilbert, a board certified orthopedic surgeon, on March 19, 2008, at the request of respondent. After his examination, Dr. Gilbert opined that claimant had a herniated nucleus pulposus at L5-S1 with radiculopathy. She had a fair result following surgery but still had complaints. Using the AMA *Guides*,[2] he opined that claimant was in DRE Lumbosacral Category III and had a 10 percent whole body impairment.

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[1] R.H. Trans. at 39.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Gilbert recommended that claimant continue at sedentary activities with occasional lifting of 10 pounds, occasional pushing, pulling or carrying of 10 pounds, and no frequent lifting, carrying, pushing or pulling. He did not place any limitation on claimant as to the number of hours per day that she could work. Further, he stated that claimant's FCE did not make a specific recommendation regarding time restrictions. Dr. Gilbert reviewed the task list prepared by Mary Titterington. Of the 33 tasks on that list, he opined that claimant would be unable to perform 12 for a task loss of 36 percent.

Dr. Joseph Huston, an orthopedic surgeon, examined claimant on May 13, 2008, at the request of claimant's attorney. After conducting a physical examination of claimant, Dr. Huston concluded that the discectomy performed by Dr. Smith had not been beneficial and that claimant continued to have significant low back and right lower leg pain.

Using the AMA *Guides*, Dr. Huston found that claimant had a 10 percent permanent partial impairment of the whole body. He recommended that claimant not lift, carry or push over 15 pounds and should not twist, bend or stoop more than four times in an hour. He recommended that her work hours be limited to five or six a day. Dr. Huston reviewed a task list prepared by Doug Lindahl. Mr. Lindahl's list has 15 tasks listed, and Dr. Huston said claimant was unable to perform 10 for a task loss of 66.7 percent.

Dr. Huston said he thought he gave claimant a 5 to 6 hour a day restriction because claimant told him she was only able to work that long because of the side effects of her medication. He found nothing in claimant's physical examination that would indicate she could not work 7 to 7 1/2 hours a day on a split shift.

Doug Lindahl, a vocational rehabilitation counselor, interviewed claimant by telephone on July 21, 2008, at the request of claimant's attorney. He prepared a list containing 15 job tasks claimant had performed in the 15-year period before her injury. He did not testify concerning claimant's wage loss, but his report indicates that claimant would not be able to work full time because of her restrictions.

Mary Titterington, a vocational rehabilitation counselor, met with claimant on February 12, 2009, at the request of respondent. Together they identified 33 job tasks claimant had performed in the 15-year period before her accident.

Claimant told Ms. Titterington that she was working 20 hours a week at Kansas State University, and was earning $10.56 per hour. Claimant also told Ms. Titterington that she had previously been working 30 hours a week at respondent but could not tolerate working that long. Ms. Titterington could not remember whether claimant said she could not tolerate working 30 hours because of pain or because her medication made her groggy and tired, or if it was a combination of the two. Ms. Titterington said that based on Dr. Huston's testimony, claimant could work 7 to 7 1/2 hours a day in a split shift and could earn the same hourly wage she earned before her injury.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Board's review of an Award in workers compensation claims is de novo.[3] K.S.A. 2008 Supp. 44-555c(a) states in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[3] See *Riedmiller v. Harness*, 29 Kan. App. 2d 941, Syl. ¶ 3, 34 P.3d 474 (2001), *rev. denied* 273 Kan. 1037 (2002); *Miner v. M. Bruenger & Co.*, 17 Kan. App. 2d 19, Syl. ¶ 1, 836 P.2d 19 (1992).

The Kansas Supreme Court recently stated in *Bergstrom*:[4]

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.

An employee, without approval of the employer, may consult with a health care provider for examination, diagnosis or treatment, but the employer is only liable for fees of $500, under such circumstance.[5]

ANALYSIS

Claimant's injury resulted in a 10 percent permanent impairment of function to the body as a whole. Because she suffered a general body disability, her permanent partial disability is controlled by K.S.A. 44-510e.

Following her release from medical treatment, claimant returned to work, but she did not earn 90 percent or more of the gross average weekly wage she was earning at the time of her injury. Therefore, her permanent partial disability is not limited to her percentage of functional impairment. Instead, it is determined by averaging her task loss and her wage loss. Claimant's task loss lies somewhere between the 36 percent opinion expressed by Dr. Gilbert and the 66.7 percent opinion of Dr. Huston. Giving approximately equal weight to both opinions, the Board finds claimant has lost the ability to perform 51 percent of the work tasks she had performed during the 15-year period before her accident.

Following her injury, claimant was paid the equivalent of 39.73 weeks of temporary total disability compensation. Thereafter, for the period of March 19, 2008, through September 24, 2008, claimant earned $363 per week (30 hours x $12.10 per hour) which, when compared with her preinjury average weekly wage of $477.36, computes to a wage loss of 24 percent. Averaging this wage loss with her task loss of 51 percent computes to a work disability of 37.5 percent. For the period of September 25, 2008, forward, claimant

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[4] *Bergstrom v. Spears Manufacturing Company*, __ Kan. ___, Syl. ¶¶ 1, 3, 214 P.3d 676 (2009).

[5] K.S.A. 2008 Supp. 44-510h(b)(2).

earned $211.20 per week which, when compared with her preinjury average weekly wage of $477.36 computes to a wage loss of 56 percent. Averaging this wage loss with her task loss of 51 percent computes to a work disability of 53.5 percent.

CONCLUSION

(1) Claimant is entitled to 39.73 weeks of temporary total disability benefits, followed by permanent partial general disability from March 19, 2008, through September 24, 2008, of 37.5 percent, followed by permanent partial general disability from September 25, 2008, forward of 53.5 percent, to continue until the Award is paid or until further order of the Director.

(2) For the reasons set forth in the ALJ's Award, the expenses for medical treatment claimant received after being released by Dr. Smith on March 7, 2008, should be paid as authorized. Therefore, respondent is liable for that treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated April 10, 2009, is affirmed concerning payment of claimant's medical expenses from St. Francis Health Care and Dr. Guy Giroux, but is modified to find that claimant is entitled to permanent partial general disability from March 19, 2008, through September 24, 2008, of 37.5 percent, followed by permanent partial general disability from September 25, 2008, forward of 53.5 percent.

Claimant is entitled to 39.73 weeks of temporary total disability compensation at the rate of $318.26 per week or $12,644.47, followed by 27 weeks of permanent partial disability compensation at the rate of $318.26 per week or $8,593.02 for a 37.5 percent work disability, followed by 181.79 weeks of permanent partial disability compensation at the rate of $318.26 per week or $57,856.49 for a 53.5 percent work disability, making a total award of $79,093.98.

As of September 30, 2009, there would be due and owing to the claimant 39.73 weeks of temporary total disability compensation at the rate of $318.26 per week in the sum of $12,644.47 plus 80 weeks of permanent partial disability compensation at the rate of $318.26 per week in the sum of $25,460.80 for a total due and owing of $38,105.27, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $40,988.71 shall be paid at the rate of $318.26 per week for 128.79 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of September, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Richard H. Seaton, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge